Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

MICHAEL B. HUFFMAN,
Respondent

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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* JOSEPH P. CONTI
District Attorney for Erie County
By: Chad Vilushis
Assistant District Attorney

* Counsel of Record

Office of District Attorney
of Erie County
Erie County Courthouse
140 West Sixth Street
Erie, PA 16501
(814) 451-6349

H9 PP

QUESTION PRESENTED

Whether the sexually violent predator provisions of Pennsylvania's Sexual Offenders Act, 42 Pa.C.S. §§ 9791-9799.6, violate the due process protections of the Fourteenth Amendment?

LIST OF PARTIES

The names of all parties to the proceeding in the court whose judgement is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, the Commonwealth of Pennsylvania, respectfully petitions for a writ of certiorari to review the judgement of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The Pennsylvania Supreme Court issued an Opinion on September 8, 1999 at Number 69 Western District Allocatur Docket 1998, and is reproduced in the Appendix filed herewith ("App.") A at page 1a. The Pennsylvania Superior Court issued an Opinion on June 29, 1998 at Number 1813 Pittsburgh Docket 1997 and is reproduced as Appendix B at page 2a. The trial court issued an Opinion and Order on September 18, 1998 declaring the Sexual Offender Statute unconstitutional and is reproduced as Appendix C at page 9a.

STATEMENT OF JURISDICTION

On September 8, 1999, the Pennsylvania Supreme Court decided an important Federal question in a way which conflicts with relevant decisions of this court, and decided an issue that has not been, but should be, settled by this Court. This petition has been filed within ninety days of that date. Jurisdiction is conferred upon this Court pursuant to Supreme Court Rule 10(c), 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The due process clause of the 14th amendment to the United States Constitution provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". (42 Pa.C.S. §9791-9799.6 is attached as Appendix D at page 11a.

STATEMENT OF THE CASE

The issue in this case is whether the provisions of Pennsylvania's Sexual Offenders Act violate the due process clause of the Fourteenth Amendment. Specifically, the issue relates to the Pennsylvania legislature's enactment of a statute which provides that an individual who has been convicted beyond a reasonable doubt of certain enumerated crimes is presumed to be a "sexually violent predator". The legislature provided further that the sentence for an individual convicted of one of the crimes and presumed to be a "sexually violent predator" would include a mandatory maximum penalty of life supervision which is an increase in the maximum penalty otherwise provided for these crimes in Pennsylvania's sentencing law. Minimum penalties are not affected by the sexual offender statute. The legislature further provided that an individual convicted of one of the crimes and presumed to be a sexually violent predator must be given the opportunity to rebut the statutory presumption prior to sentencing. As part of the sexually violent predator hearing, the defendant is entitled to notice, the opportunity to be heard, the right to confront and cross-examine witnesses, the right to call witnesses including expert witnesses, and the right to counsel. As a aid to the court, the legislature also required the offender to undergo an assessment encompassing a psychiatric and psychological examination. The examination is conducted by trained professionals who are members of the Commonwealth's Sexual Offender Assessment Board. The results of the assessment are provided to the parties prior to the hearing and these professionals are available to be called as witnesses by either party at the sexually violent predator hearing. If the defendant rebuts the legislative presumption by clear and convincing evidence, then he is not subject to the mandatory maximum penalty of life supervision.[1]

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[1]The sexual offender registration and notification provisions of the statute are not at issue in this matter. 42 Pa.C.S. §§ 9793, 9795, 9797, 9798.

The Pennsylvania Supreme Court held that, despite the due process protections provided in the Act, anything less than the full panoply of due process guarantees is violative of the Fourteenth Amendment. The Court found "the Act's imposition of the presumption that a person convicted of a predicate offense is a sexually violent predator, and the requirement that the offender rebut the presumption, to be constitutionally repugnant". The decision of the Pennsylvania Supreme Court is in conflict with previous rulings of this Court concerning due process. All fifty states and the District of Columbia have enacted sexual offender legislation.[2] Review of this case would address issues left

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[2]Ala.Code § 13A-11-200 (1994); Alaska Stat. §§ 12.63.010, 18.65.087 (1994); Ariz.Rev.Stat.Ann. §§ 13-3821, 41-1750(B)(1995); Ark.Code Ann.§12-12-901 (Michie 1994); Cal.Penal Code §2890 to 390.7 (West 1995); Colo. Rev.Stat.Ann. §18-3-412.5 (West 1995); Conn.Gen.Stat. §§ 54-102r (1995); Del.Code Ann. tit. 11 § 4120 (1994); D.C. Code Ann. §24-1101 to 1117 (1996); Fla.Stat. ch. 775.21 (1995); Ga.Code Ann. §42-9-44.1 (Michie 1995); Haw.Rev.Stat. § 707-743 (1996); Idaho Code §§ 18-8301 to 8311 (1995); Ill.Rev.Stat. ch. 730 para. 150/1 (1995); Ind.Code §5-2-12- 1 to 12 (1995); Iowa Code Ann. § 692A.1 to .15 (1996); Kan.Stat.Ann. § 22-4902 to 4909 (1995); Ky.Rev.Stat.Ann. § 17.510 (Baldwin 1995); La.Rev.Stat.Ann. § 15:540 to 549 (1995); Me.Rev.Stat.Ann. tit. 34-A, §§ 11003, 11004 (West 1994); Md. Ann. Code art. 27, § 792 (1997); Mass.Gen.Laws Ann. ch. 22C, § 37 (1995); Mich.Comp. Laws Ann. § 28.721 to .732 (West 1997); Minn.Stat. § 243.166 (1995); Miss.Code Ann. §45-33-1 (1995); Mo.Rev.Stat.Ann. §566.600 (1995); Mont.Code Ann. § 46-23-501 to 507 (1994); Neb. Rev. Stat. Ann. § 29-4001 to 4013 (1996); Nev.Rev.Stat. §207.151 to .157 (1993); N.H.Rev.Stat.Ann. § 632-A:12 (1994); N.J.Stat.Ann.§2C:7-1 to 7-11 (West 1994); N.M. Stat.Ann. § 29-11A-1 to 8 (Michie 1997); N.Y. Correct. Law § 168 (McKinney 1996); N.C. Gen.Stat. § 14-208.1 to .13 (1996); N.D.Cent.Code § 12.1-32-15 (1993); Ohio Rev.Code Ann. § 2950.01 (Baldwin 1995); Okla.Stat.Ann. tit. 57 § 581 to 587 (1995); Or.Rev.Stat. §§ 181.508, 181.518 (1994); 42 Pa. Cons. Stat. §9791 to 9799.6 (West 1996); R.I.Gen.Laws § 11-37-16 (1994); S.C. Code Ann. § 23-3-400 to 490 (Law. Co-op. 1996); S.D. Codified Laws Ann. §

unresolved in Kansas v. Hendricks, 521 U.S. 346 (1997) which dealt with civil commitments of sexually violent predators not criminal sentencing, as the Pennsylvania Act does. The Court should, therefore, take this opportunity to resolve this issue which is important to the legislature's enactment of similar laws across the nation and would clarify the due process protections necessary in a post-conviction sentencing context.

On April 2, 1997, the appellant, Michael B. Huffman, entered pleas of guilty before the court on three counts of Involuntary Deviate Sexual Intercourse, one count of Aggravated Indecent Assault, one count of Indecent Assault, and one count of Corruption of Minors. Prior to the entry of his guilty plea, the appellant was advised of the possible consequences to the entry of such pleas as set forth in Pennsylvania's "Megan's Law" statute, 42 Pa.C.S.A. §9791 et. seq. Immediately following the plea colloquy, the court ordered an evaluation of the appellant by the State Board to Assess Sexual Offenders ("Board"), pursuant to 42 Pa.C.S.A. §9794.

On June 25, 1997 a hearing was held to determine the sexually violent predator status of the appellant. Following the hearing, the court found the appellant to be a sexually violent predator subject to the mandates of 42 Pa.C.S.A. §9799.4(a).

The court sentenced the appellant on July 3, 1997, to the following periods of incarceration: fifteen (15) years to life on each of the three Involuntary Deviate Sexual Intercourse counts and thirty (30) months to sixty (60) months on each of the remaining three counts. Pursuant to post-sentencing motions filed by both the Commonwealth and the appellant, the court increased the appellant's maximum sentences on the charges of Indecent

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22-22-30 to 39 (1995); Tenn. Code Ann. § 40-39-101 to 108 (1994); Tex.Civ.Stat.Code Ann. § 6252-13c.1 (West 1995); Utah Code Ann. § 77-27-21.5 (1994); Vt.Stat.Ann. tit. 13, § 5401 to 5413 (1996); Va.Code Ann. §§ 19.2-298.1 to 3, 19.2-390.1 (Michie 1995); Wash Rev.Code §§ 9A,44.130, 4.24.550 (1995); W.Va.Code § 61-8F-1 to 8 (1994); Wis.Stat.Ann. § 175.45 (1995); Wyo.Sta. § 7-19-301 (1995).

Assault and Aggravated Indecent Assault to life, while reducing the appellant's minimum sentence on each of the three Involuntary Deviate Sexual Intercourse counts to ten (10) years.

On August 20, 1997, the appellant, through appellate counsel, appealed to the Superior Court. In his appeal he challenged the sentence, challenged the constitutionality of the statute, and claimed that trial counsel was ineffective for failing to raise the constitutional challenge in a timely fashion.

On June 29, 1998, the Superior Court issued an opinion remanding the case back to the trial court for an appointment of new counsel to address the claim of ineffectiveness.

On September 9, 1998, the trial court held an evidentiary hearing and on September 14, 1998 concluded that trial counsel was ineffective for failing to challenge the constitutionality of the statute.

The court then allowed new counsel to raise the constitutional challenge which the court subsequently granted on September 18, 1998. After declaring the pertinent provisions of the statute unconstitutional, the court proceeded to re-sentence Mr. Huffman, failing to impose the mandatory maximum sentence pursuant to 42 Pa.C.S.A. §9799.4.

On October 16, 1998 the Commonwealth appealed to the Pennsylvania Supreme Court. On September 8, 1999, the Pennsylvania Supreme Court affirmed the Order of the Erie County Court of Common Pleas dated September 18, 1998, based upon their decision in Commonwealth v. Williams, 84 W.D. Appeal Docket 1997, 1999 W.L. 1873 (Pa.)[3]

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[3]A Petition for Writ of Certiorari was filed by the Commonwealth on October 22, 1999, for the United States Supreme Court's consideration.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Supreme Court's decision places it at odds with this Court's precedent and interprets this Court as requiring that a full panoply of trial rights is the process due to an individual who has been convicted, and is awaiting sentencing as a sexually violent predator. All fifty states and the District of Columbia have enacted sexual offender statutes to address the legitimate concerns over offenses against children in sexually violent crimes.

The provisions of 42 Pa.C.S. §§9791-9799.6 (the Act) provide that an individual who is convicted after a plea or trial of certain enumerated offenses is presumed to be a sexually violent predator and is subject to a mandatory maximum penalty of life supervision.[4] Minimum penalties are not affected by the Act. Pursuant to the Act and prior to sentencing, the court orders that the offender be examined by two members of the Sexual Offenders Assessment board who are mental health professionals. A report concerning the examination is provided to the court and, through the court, to the parties. Also prior to sentencing, the court conducts a sexually violent predator hearing to determine whether the offender is a sexually violent predator and, thus, should receive the mandatory maximum penalty. At the hearing, evidence is presented for the court to consider in determining whether the presumption will apply. Prior to the hearing, the defendant is given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses, and the right to cross-examine witnesses. At all times the offender has the right to counsel and appointed counsel if necessary. At this hearing the defendant has the opportunity to rebut the legislative presumption. If the court finds that the offender has rebutted the

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[4]The offenses include Rape, 18 Pa.C.S. §3121; Involuntary Deviate Sexual Intercourse, 18 Pa.C.S. §3123; Aggravated Indecent Assault, 18 Pa.C.S. §3125; and the following offenses against children: Kidnaping, 18 Pa.C.S. §2901; Prostitution, 18 Pa.C.S. §5902(b); Indecent Assault, 18 Pa.C.S. §3126; and Obscene Materials or Performances, 18 Pa.C.S. §5903(a)(3)(4)(5)(6).

presumption by clear and convincing evidence, he is deemed not to be a sexually violent predator and he is, therefore, not subject to the mandatory maximum penalty. Since minimum terms of incarceration are not effected, any minimum term can be imposed and the offender is eligible for parole after serving his minimum term. While under supervision on parole the offender is subject to the registration, community notification and reporting requirements of the Act. However, if the presumption is not rebutted by clear and convincing evidence and the court determines that the offender is a sexually violent predator, then the court must impose the maximum penalty of life supervision. The Pennsylvania Supreme Court erred in declaring that the due process protections set forth above are insufficient and violate the Fourteenth Amendment Due Process clause. In arriving at its decision, the Pennsylvania Supreme Court relied upon precedent of this Court and misinterpreted this precedent as setting forth the requirement that the full panoply of due process rights afforded in a criminal trial must be satisfied in this statute's sentencing context.

The Pennsylvania Court's decision to strike down the sexual offender statute violates this Court's caution in McMillan v. Pennsylvania, 477 U.S. 79 (1986) that "we should hesitate to conclude that due process bars the state from pursuing its chosen course in the area of defining crimes and prescribing penalties." Granted the Act does result in an increased penalty which includes a maximum of life supervision. However, arriving at that maximum sentence in no way alleviates the Commonwealth's burden of proof beyond a reasonable doubt at trial. It is precisely the legislature's role to determine the penalties. If the legislature merely chose a maximum penalty of life in prison for these offenses, it could have done so. Significantly, the legislature chose life in prison as the sentence, but also afforded the opportunity to avoid this legislatively mandated penalty. As such, this sentencing scheme does not violate due process.

The Pennsylvania Supreme Court misinterpreted this court's precedent in Specht v. Patterson, 386 U.S. 605 (1967) in which the Colorado Sex Offender Act was stricken. First, the Pennsylvania Supreme Court failed to recognize the significant differences between the Colorado Act and Pennsylvania's Act.

Unlike Colorado, the Pennsylvania Act merely makes the commission of certain specified crimes a basis for sentencing. This Court found that the Colorado statute actually made one conviction the basis for another proceeding, not the basis for sentencing. In addition, the Pennsylvania Supreme Court interpreted Specht to mean that, under a sentencing statute like the Act, the due process clause requires a full panoply of trial rights. This misinterpretation was highlighted by this Court in McMillan v. Pennsylvania, 477 U.S. 79 (1986), where this Court explained its decision in Specht. This Court clarified that the judge's post-trial finding in Colorado, without notice of a hearing, did not satisfy due process. This Court went on further and indicated that due process requires a right to be present with counsel, to be heard, to be confronted with and to cross examine the witnesses against him, and to offer evidence on their own behalf. Therefore, the decision in Specht does not require a full panoply of rights afforded in a criminal jury trial and every due process protection set forth in Specht exists in Pennsylvania's Sexual Offenders Act.[5]

In analyzing the constitutionality of the Sexual Offender's Act, the Pennsylvania Supreme Court failed to address the propriety of the Pennsylvania Legislature's statutory presumption, failed to analyze the validity of burden shifting in a sentencing mitigation context, and failed to recognize the strong presumption of constitutionality of acts of the legislature.

Pennsylvania's sexual offender statute is a sentencing statute. It is found within the Pennsylvania sentencing code, its provisions only accrue after a conviction by proof beyond a reasonable doubt, it is based upon a legislative presumption founded on concern over protecting the community from convicted sexual offenders, the presumption is not a necessary element of the underlying crimes, and it addresses the penalty and parole or release conditions of a convicted offender. However, it is not just a sentencing statute, but instead is a sentence mitigation statute

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[5]The well-reasoned dissent by Pennsylvania Supreme Court Justice Castille sets forth a similar analysis of the constitutionality of our statute.

that allows an offender to prove that he does not deserve the maximum sentence contemplated by the legislature.

The Pennsylvania Supreme Court failed to properly analyze the propriety of burden shifting after conviction. "So long as a state's method of allocating the burden of proof does not lessen the State's burden to prove every element of the offense charged, as in this case to prove aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990). Pennsylvania's legislature did not lessen the Commonwealth's burden of proof for any element of the crime charged. Therefore, it was proper to place the burden on the convicted offender to rebut the presumption and show why he is entitled to a lesser sentence.

The Pennsylvania Supreme Court also failed to analyze the validity of the Pennsylvania legislature's presumption. As this Court has stated, a statutory presumption may be sustained if there is a rational relationship between the fact proved and the ultimate fact presumed. Tot v. United States, 319 U.S. 463, 467 (1943). "The process of making the determination of rationality is, by its nature, highly empirical" United States v. Gainey, 380 U.S. 63, 67 (1965), and significant weight must be given to the conclusions of the legislature concerning matters which are commonplace or not within specialized judicial competence. As the legislature stated in its legislative findings and declaration of policy, 42 Pa.C.S. §9791, "Sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest." Therefore, there is a rational relationship between the conviction of one of the enumerated offenses and the presumption that such an individual is a sexually violent predator, necessitating a maximum penalty of life in prison. As such, the decision of the Pennsylvania Supreme Court significantly departs from this Court's precedent and this Court should grant the petition to determine whether due process should bar the Pennsylvania legislature from pursuing its chosen course in defining crimes and prescribing penalties. The legislature was cautious in enacting this statute, and provided all

of the due process protections consistent with this Court's precedent. As a result, the due process clause of the United States Constitution should not invalidate the sexual offender sentencing statute of Pennsylvania.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari and, upon review, reverse the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

JOSEPH P. CONTI
District Attorney for Erie County
By: Chad Vilushis
Assistant District Attorney

Office of the District Attorney
of Erie County, Pennsylvania
Erie County Courthouse
140 West Sixth Street
Erie, PA 16501
(814) 451-6349

APPENDIX

APPENDIX A - ORDER OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, DATED SEPTEMBER 8, 1999

COMMONWEALTH OF PENNSYLVANIA,	: 69 W.D. Appeal Docket 1998
Appellant	:Appeal from the Order of the :Erie County Court of Common :Pleas, Criminal Division, dated :September 18, 1998 at No. 250 :of 1997.
v.	:
MICHAEL B. HUFFMAN,	:
Appellee	:

ORDER

PER CURIAM **DECIDED: SEPTEMBER 8, 1999**

Based upon disposition in Commonwealth v. Williams, __ Pa. __, A.2d __ (No. 84 W.D. Appeal Docket 1997, filed June 30, 1999), we affirm the Order of the Erie County Court of Common Pleas dated September 18, 1998. Furthermore, we remand the matter to the common pleas court for disposition of any remaining issues.

Jurisdiction is relinquished.

Judgment Entered September 8, 1999.

APPENDIX B - JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA, PITTSBURGH DISTRICT, DATED JUNE 29, 1998

COMMONWEALTH OF PENNSYLVANIA,	:IN THE SUPERIOR COURT :OF PENNSYLVANIA
	:
Appellee	:Appeal from the Judgment of :Sentence of July 3, 1997 in :the Court of Common Pleas of :Erie County, Criminal No. 00250
v.	:of 1997.
	:
MICHAEL B. HUFFMAN,	:No. 1813 Pittsburgh 1997
	:
Appellant	:

BEFORE: KELLY, MUSMANNO, JJ., and CIRILLO, P.J.E.

MEMORANDUM: FILED: JUNE 29, 1998

Appellant Michael B. Huffman appeals from a judgment of sentence entered in the Court of Common Pleas of Erie County. We remand.

Michael Huffman entered a guilty plea to charges of involuntary deviate sexual intercourse, aggravated indecent assault, indecent assault and corruption of minors. These charges arose as a result of Huffman's assaults upon his seven year-old stepdaughter. On April 2, 1997, the Honorable Shad Connelly entered the following order:

> **AND NOW, TO-WIT**, this 2nd day of April, 1997, the Defendant having tendered a plea of guilty to three (3) counts of Involuntary Deviate Sexual Intercourse by Forcible Compulsion and

> one (1) count of Aggravated Indecent Assault, and these offenses are offenses to which the statute known as Act 46, 1996, "Megan's Law" applies, 42 Pa.C.S.§9791, *et seq.*, the Court directs that the State Board to Assess Sexual Offenders perform an assessment of the Defendant as required by Section 9794 of the above referenced law to determine if the Defendant is a **sexually violent predator.**
>
> **The Clerk of Courts is directed to immediately forward a copy of this Order to Mr. David Rockwell, Executive Director, State Board to Assess Sexually Violent Predators, 116 Pine Street, Harrisburg, PA 17101.**

(emphasis added). On June 25, 1997, the court held a hearing to determine whether Huffman was a sexually violent predator. ***See*** 42 Pa.C.S. §9799.4(a).[1] Following the hearing, the court found

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[1]The statute at issue here, 42 Pa.C.S. §9791 ***et seq.***, is known as "Megan's Law," named after Megan Kanka, a seven year-old New Jersey girl who was murdered by a neighbor, a convicted sex offender. Megan Kanka's murder ultimately led to the enactment of sex offender registration and community notification laws in New Jersey and across the nation. Under Pennsylvania's statute, a person convicted of certain enumerated offenses in section 9793(b) (including, but not limited to, felony offenses that involved a minor victim relating to kidnaping, rape, involuntary deviate sexual intercourse, aggravated indecent assault, prostitution and related offenses, and offenses relating to obscene and other sexual materials and performances), is presumed to be a sexually violent predator (SVP) and is subjected to assessment by the State Board to Assess Sexually Violent Predators. 42 Pa.C.S. §9794(a) and (c). The Board forwards its assessment to the trial court, which then conducts a hearing at which the defendant is given the opportunity to refute the presumption that he is a sexually violent predator. Thereafter, the trial court determines whether the presumption has been rebutted. ***See*** 42 Pa.C.S. §9794(e). If the court determines that defendant is

that Huffman was a sexually violent predator and set a date for sentencing. At the conclusion of the sentencing hearing, the court stated on the record the various factors and considerations it took into account prior to sentencing Huffman. The court considered the presentence report, the factors set forth in the Sentencing Code, the victim's age, the fact that Huffman was the victim's caretaker, the physical and emotional trauma suffered by the child, and its prior determination that Huffman was a sexually violent predator. The court then sentenced Huffman to concurrent terms of 15 years to life imprisonment on the three counts of involuntary deviate sexual intercourse, and to a term of thirty to sixty months imprisonment on the remaining counts of indecent assault and aggravated indecent assault. The sentences for indecent assault and aggravated indecent assault were subsequently modified, upon the Commonwealth's motion, to concurrent terms of 30 months to life imprisonment. These concurrent sentences were to run concurrently with the sentences for involuntary deviate sexual intercourse.

On July 21, 1997, upon consideration of Huffman's motion to reconsider the sentence, the court reduced defendant's minimum sentence on each count of involuntary deviate sexual intercourse from 15 years to 10 years imprisonment. All other aspects of the sentence remained unchanged. On August 20, 1997, Huffman filed this appeal. That same date, the trial court ordered Huffman to file a concise statement of the matters complained of on appeal. ***See*** Pa.R.A.P. 1925(b). Huffman raises the following claims for our review:

1. Did the sentences violate due process in that they: A) cast a chill upon the right to associate;

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a sexually violent predator, the offender is subjected to registration and counseling requirements and an enhanced mandatory maximum sentence of life imprisonment. ***See*** 42 Pa.C.S. §9799.4(a) and (d). Further, if a sexually violent predator is convicted of a subsequent sexually violent offense, the trial court must impose a mandatory life sentence. ***See*** 42 Pa.C.S. §9799.4(c) and (d).

and B) create a presumption that violates due process?

2. Did the sentences violate Mr. Huffman's right to privacy?

3. Did the sentences operate as a bill of attainder?

4. Did the sentences violate [appellant's] rights against double jeopardy?

5. Was the evidence statutorily or constitutionally insufficient due to: A) the lack of professional qualifications of the witness adduced in support of the Commonwealth's position; and B) the prior contact with Mr. Huffman?

6. Did the examination - on pain of being deemed to have failed to meet a burden of proof imposed upon him to rebut a presumption - or, in the alternative, in the absence of the appropriate variant of "Miranda warnings" - violate the right against self-incrimination?

7. Is said statute void since it is vague?

8. Did the examination - on pain of being deemed to have failed to meet a burden of proof or, in the absence of counsel, violate rights to counsel? [sic]

9. Was [appellant] deprived of the effective assistance of counsel?

Huffman's first eight constitutional claims have not been properly preserved; they are, therefore, waived. On August 20, 1997, the court ordered Huffman to file a concise statement of matters complained of on appeal within fourteen days. ***See*** Pa.R.A.P. 1925(b). In response, Huffman filed a "Preliminary Statement of Matters Complained of on Appeal," in which he incorporated by reference all post-sentencing motions. He also stated that "if any of said issues are deemed waived by failure to

raise [them] earlier in these proceedings, Mr. Huffman was deprived of the effective assistance of counsel." On September 3, 1997, the court entered an order granting Huffman leave to file an amended or supplemental 1925(b) statement within seven days after the filing of the transcripts. The docket listing includes the following entry: "10/10/1997 FINAL STATEMENT OF MATTERS COMPLAINED OF ON APPEAL FILED BY J BURT ESQ" The trial court, in its 1925(b) statement, acknowledges the final statement. The certified record on appeal, however, includes an amended or supplemental 1925(b) statement. In any event, although the trial court acknowledged that Huffman raised "numerous constitutional challenges to Pennsylvania's Megan's Law" in his "Final and Supplemental Concise Statements of Matters Complained of an Appeal," the court determined that none of these issues were raised and, therefore, concluded that Huffman's claims were waived. We agree.

This court only reviews issues first presented to the trial court. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); Pa.R.Crim.P. 1410(B)(1)(c) ("Issues raised before or during trial shall be deemed preserved for appeal whether or not defendant elects to file a post-sentence motion on those issues."); Pa.R.Crim.P. 1410 (Comment) ("Because the post-sentence motion is optional, the defendant may choose to raise any or all **properly preserved** issues in the trial court, in the appellate court, or both") (emphasis added); ***Commonwealth v. Romberger***, 474 Pa. 190, 378 A.2d 283 (1977); ***Commonwealth v. Cooper***, No. 1217 Pittsburgh 1997, 1998 Pa. Super. LEXIS 624 (April 8, 1998). ***See also Petition of Piscanio***, 235 Pa.Super. 490, ____, 344 A.2d 658, 661 (1975) (finding that constitutional challenges to a denial of a private criminal complaint were waived by the affiant's failure to raise the constitutional issues in the trial court); ***Commonwealth v. Widmer***, 547 Pa. 137, 689 A.2d 211 (1997) (explaining that, although post-sentence motions are no longer required to preserve issues in criminal matters, issues must still be raised initially in the lower court). ***See generally***, Darlington, ***Pennsylvania Appellate Practice*** 2d, §§ 302:1-302:14. We conclude, therefore, that these claims are waived.

In his final issue Huffman argues that trial counsel was ineffective for failing to preserve any of the issues presented on appeal. We find that this claim, too, is not reviewable. Huffman was represented at trial by Christine F. Konzel, Esquire, an assistant public defender in the Erie County Public Defender's Office. On appeal, Huffman is represented by Joseph P. Burt, Esquire, who is also an assistant public defender in the Erie County Public Defender's Office. As a general rule, a public defender may not argue the ineffectiveness of another member of the same public defender's office. ***See Commonwealth v. Ciptak***, 542 Pa. 112, 665 A.2d 1161 (1995). In ***Ciptak***, our supreme court stated that this scenario was tantamount to an assertion of one's own ineffectiveness. ***Id.*** at —, 665 A.2d at 1161-62. "When appellate counsel asserts a claim of his or her own ineffectiveness, the case should be remanded so that new counsel may be appointed except (1) where it is clear from the record that counsel was ineffective or (2) where it is clear from the record that the ineffectiveness claim is meritless." ***Id.*** at —, 665 A.2d at 1162, ***citing Commonwealth v. McBee***, 513 Pa. 255, 261, 520 A.2d 10, 13 (1986). ***See also Commonwealth v. Green***. No. 45 W.D. Appeal Docket 1996, 1998 Pa. LEXIS 528 (March 27, 1998).

We must remand for appointment of new counsel unless we can make a conclusive determination as to counsel's ineffectiveness from the record. ***Green, supra; Ciptak, supra***. Here, trial counsel's reasons for failing to challenge the constitutionality of the sentencing statute is not apparent from the record. ***Ciptak, supra***. We, therefore, remand this matter to the trial court for appointment of new counsel and an evidentiary hearing.

Remanded. Jurisdiction relinquished.

COMMONWEALTH OF PENNSYLVANIA,	:IN THE SUPERIOR COURT :OF PENNSYLVANIA
v.	:
MICHAEL B. HUFFMAN,	:No. 1813 Pittsburgh 1997
Appellant	:

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Erie County be, and the same is hereby REMANDED. JURISDICTION RELINQUISHED.

BY THE COURT:

Eleanor R. Valecko
DEPUTY PROTHONOTARY

APPENDIX C - OPINION AND ORDER OF JUDGE SHAD CONNELLY OF THE COURT OF COMMON PLEAS OF ERIE COUNTY, DATED SEPTEMBER 18, 1998.

COMMONWEALTH OF PENNSYLVANIA	:IN THE COURT OF COMMON :PLEAS OF ERIE COUNTY, :PENNSYLVANIA
v.	:
MICHAEL B. HUFFMAN	:No. 250 of 1997

OPINION

Pursuant to defendant's Motion for Reconsideration/Modification of Sentence, this Court concludes consistent with its prior Opinions[1] that by allocating the burden of proof to the defendant to prove that he is not a sexually violent predator, and presuming that he is such unless rebutted, Megan's Law violates the 5th and 14th Amendments of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution, and is therefore in violation of the defendant's substantive and procedural due process rights and as such are unconstitutional. In light of this holding, the other issues raised by the defendant are moot and will not be addressed by the court.

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[1] ***See Commonwealth v. Willoughby***, 2661 of 1997, and ***Commonwealth v. Flanders***, 1341 of 1997.

COMMONWEALTH OF PENNSYLVANIA	:IN THE COURT OF :COMMON PLEAS OF ERIE :COUNTY, PENNSYLVANIA
v.	:
MICHAEL B. HUFFMAN	:No. 250 of 1997

ORDER

AND NOW, TO-WIT, this 18th day of September, 1998, consistent with the foregoing Opinion, defendant's Motion for Reconsideration/Modification of Sentence is **GRANTED** as follows:

(1) the sentence as to Count 1, Involuntary Deviate Sexual Intercourse, is hereby reduced to 10 to 20 years;

(2) the sentence as to Count 2, Involuntary Deviate Sexual Intercourse, is hereby reduced to 10 to 20 years;

(3) the sentence as to Count 3, Involuntary Deviate Sexual Intercourse, is hereby reduced to 10 to 20 years;

(4) the sentence as to Count 4, Aggravated Indecent Assault, and Count 5, Indecent Assault, are reduced to 30 to 60 months; and

(5) the sentence on Count 6, Corrupting the Morals of a Minor, shall remain as previously set, 30 to 60 months.

The sentences as to the Involuntary Deviate Sexual Intercourse counts are concurrent; the sentences on the Aggravated Indecent Assault, Indecent Assault and Corruption counts are concurrent to each other but consecutive to the sentences for Counts 1, 2 and 3.

BY THE COURT:
Shad Connelly, Judge

APPENDIX D – RELEVANT PENNSYLVANIA STATUTORY PROVISIONS IN QUESTION

(42 Pa.C.S. §9791-9799.6)

§ 9791. Legislative finding and declaration of policy

(a) Legislative findings.—It is hereby determined and declared as a matter of legislative finding:

(1) If the public is provided adequate notice and information about sexually violent predators and certain other offenders, the community can develop constructive plans to prepare themselves and their children for the offender's release. This allows communities to meet with law enforcement to prepare and obtain information about the rights and responsibilities of the community and to provide education and counseling to their children.

(2) These sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a paramount governmental interest.

(3) The penal and mental health components of our justice system are largely hidden from public view and lack of information from either may result in failure of both systems to meet this paramount concern of public safety.

(4) Overly restrictive confidentiality and liability laws governing the release of information about sexually violent predators have reduced the willingness to release information that could be appropriately released under the public disclosure laws and have increased risks to public safety.

(5) Persons found to have committed such an offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.

(6) Release of information about sexually violent predators to public agencies and the general public will

further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.

(b) Declaration of policy.—It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective.

Historical and Statutory Notes

Section 2 of Act 1995-24 (Spec. Sess. No. 1), provides:

"The provisions of this act are severable. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application."

Notes of Decisions

Double jeopardy 1

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1. Double jeopardy

Hearing, pursuant to Megan's Law, giving court opportunity to determine whether person convicted of sexually molesting young children is sexually violent predator does not subject such person to double jeopardy, as it merely provides offender with presentence opportunity to rebut presumption

that he is sexually violent predator, and does not charge him with separate offense. Com. v. Davis, 708 A.2d 116, Super.1998, reargument denied.

§ 9792. Definitions

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Board." The State Board to Assess Sexually Violent Predators.

"Mental abnormality." A congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

"Municipality." A city, borough, incorporated town or township.

"Offender." An individual who is:

(1) designated a sexually violent predator under the provisions of this subchapter; or

(2) required to register under section 9793(b) (relating to registration of certain offenders for ten years).

"Predatory." An act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

"Sexually violent offense." Any criminal offense specified in section 9793(b) (relating to registration of certain offenders for ten years).

"Sexually violent predator." A person who has been convicted of a sexually violent offense as set forth in section 9793(b) (relating to registration of certain offenders for ten years) and who is determined to be a sexually violent predator under section 9794(e) (relating to designation of sexually violent predators) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective.

§ 9793. Registration of certain offenders for ten years

(a) Registration.—A person convicted of any of the offenses set forth in subsection (b) shall be required to register a current address with the Pennsylvania State Police upon release from incarceration, upon parole from a State or county correctional institution, upon the commencement of a sentence of intermediate punishment or probation or where the offender is under the supervision of the Pennsylvania Board of Probation and Parole at the time of enactment of this section, within 30 days of the date of enactment of this section. Where the offender has been granted parole by the Pennsylvania Board of Probation and Parole, the board shall collect registration information from the offender and forward that registration information to the Pennsylvania State Police. The Department of Corrections shall not release the offender until it receives verification from the Pennsylvania State Police that it has received the registration information. Where the offender is scheduled to be released from a State correctional facility due to the expiration of the maximum term of incarceration, the Department of Corrections shall collect the information from the offender no later than ten days prior to the maximum expiration date. The Department of Corrections shall forward the registration information to the Pennsylvania State Police. Where the offender scheduled to be released due to the maximum expiration date refuses to provide the registration information, the Department of Corrections shall notify the Pennsylvania State Police of the failure to provide registration information and of the expected date, time and location of the release of the offender. The chief county probation and parole official in cooperation with a county correctional facility shall, in accordance with established guidelines, obtain the required information contained in section 9799.2(2) (relating to duties of Pennsylvania Board of Probation and Parole) regarding offenders released from a county sentence and to submit the information to the Pennsylvania Board of Probation and Parole and the Pennsylvania State Police. The offender in a county correctional facility shall not be released from incarceration or released to a sentence of probation or intermediate punishment until the information has been

obtained and submitted as required. The offender shall inform the Pennsylvania State Police within ten days if the offender changes residence. The offender shall register with a new law enforcement agency no later than ten days after establishing residence in another state. The period of registration shall be ten years.

(b) Persons required to register.—

(1) Persons convicted of any of the following offenses that are classified as a felony and involve a victim who is a minor:

18 Pa.C.S. § 2901 (relating to kidnapping) except by a parent.

18 Pa.C.S § 3121 (relating to rape).

18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

18 Pa.C.S § 3125 (relating to aggravated indecent assault).

18 Pa.C.S § 5902(b) (relating to prostitution and related offenses).

18 Pa.C.S § 5903(a)(3), (4), (5) or (6) (relating to obscene and other sexual materials and performances).

(2) Person convicted of any of the following offenses regardless of the age of the victim:

18 Pa.C.S. § 3121.

18 Pa.C.S. § 3123.

18 Pa.C.S. § 3125.

18 Pa.C.S. § 3128(a) and (b) (relating to spousal sexual assault).

(3) Persons convicted of 18 Pa.C.S. § 3126 (relating to indecent assault) when the offense is a misdemeanor of the first degree.

(c) Registration information.—The Pennsylvania State Police shall provide the information obtained under this section and sections 9795 (relating to registration of offenders) and 9796 (relating to verification of residence) to the chief law enforcement officer of the police department of the municipality in which the offender will reside. In addition, the Pennsyl-

vania State Police shall provide this officer with the address at which the offender will reside following his release from incarceration, parole or probation.

(d) Out-of-State offenders.—A person who is convicted of an offense equivalent to any of the offenses listed in subsection (b) in any other state or territory or the District of Columbia, or in any Federal court, and who, within ten years of his release or parole from incarceration, makes his residence in Pennsylvania shall be required to register a current address with the Pennsylvania State Police and shall be subject to the other provisions of this subchapter relating to registration. The period of registration shall be for ten years from the offender's release or parole from incarceration.

(e) Penalty.—Any offender who fails to register with the Pennsylvania State Police as required in this section commits a felony of the third degree.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

Section 3 of Act 1995-24 (Spec. Sess. No. 1, provides:

"The provisions of this act shall be applicable as follows;

"(1) All offenders convicted of an offense set forth in 42 Pa.C.S. § 9793(b) before the effective date of this section who remain under the jurisdiction of the Pennsylvania Board of Probation and Parole or the Department of Corrections shall be subject to the provisions of this act, with the exception of 42 Pa.C.S. §§ 9794, 9795(a), 9796(a), 9797, 9798 and 9799.4, which relate to sexually violent predators.

"(2) All offenders convicted of an offense set forth in 42 Pa.C.S. § 9793(b) committed on or after the effective date of this section shall be subject to all provisions of this act."

The 1996 amendment rewrote subsec. (a); in subsec. (b), added par. (3); and added subsecs. (d) and (e). Prior to amendment, subsec. (a) read:

"Registration.—A person convicted of any of the offenses set forth in subsection (b) shall be required to register a current address with the Pennsylvania State Police upon release

from incarceration, upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation. The period of registration shall be ten years."

Pennsylvania Code References

Guidelines for administration of Megan's Law, see 37 Pa. Code § 56.1 et seq.

Notes of Decisions

Ex post facto 3
Residence 2
Validity 1

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1. Validity

Inmate serving sentence for sex offenses faced direct, substantial, and present threat of prosecution under sex offender registration statute, and therefore, inmate's action challenging constitutionality of such statute was ripe and justiciable, though inmate had no obligation under statute to provide any registration information until ten days before expiration of his prison term; failure to provide registration information was third-degree felony under statute, statute required department of corrections to notify police of release of any offender who had not provided information, inmate's release date was less than ten months away, and inmate would inevitably be subject to prosecution under statute due to nature of his offenses. Van Doren v. Mazurkiewicz, 695 A.2d 967, Cmwlth. 1997.

Statute requiring convicted sex offenders to register their address with state police upon release from incarceration did not impose "punishment" in violation of double jeopardy and ex post facto clauses; legislative purpose of statute was not to punish, but to effectuate nonpunitive purpose of protecting public, historical analysis of act of "registration" demonstrated that measure was not traditionally regarded as punishment, any detrimental effects of registration provisions were incidental to their salutary purpose and operation, and effects of reg-

istration provisions were both regulatory and remedial in nature. Van Doren v. Mazurkeiwicz, 695 A.2d 967, Cmwlth. 1997.

2. Residence

Issue of whether treatment facility or other institution was "residence" under statute requiring convicted sex offenders to register address of their residence upon release from prison could not be reviewed on inmate's petition for review, where issue was not raised in petition for review. Van Doren v. Mazurkiewicz, 695 A.2nd 967, Cmwlth.1997.

3. Ex post facto

Sex offender registration law (Megan's Law) requiring certain convicted sex offenders to register their address with state police did not constitute "punishment," and therefore, application of law to sex offender who committed sexual offense against minor four months before effective date of law did not violate Ex Post Facto Clause of either United States or Pennsylvania Constitution; purpose behind law was nonpunitive purpose of protecting safety and general welfare of people of the commonwealth. Com. v. Gaffney, 702 A.2d 565, Super. 1997, appeal granted in part 710 A.2d 605.

§ 9794. Designation of sexually violent predators

(a) Order for assessment.—After conviction, but before sentencing, a court shall order a person convicted of a sexually violent offense specified in section 9793(b) (relating to registration of certain offenders for ten years) to be assessed by the board. The order for an assessment shall be sent to the administrative officer of the board within ten days of the date of conviction.

(b) Presumption.—An offender convicted of any offense set forth in section 9793(b) shall be presumed by the board and the court to be a sexually violent predator. This presumption may be rebutted by the offender by clear and convincing evidence at a hearing held in accordance with subsection (e).

(c) Assessment.—Upon receipt from the court of an order for an assessment, two members of the board as desig-

nated by the administrative officer of the board shall conduct an assessment of the offender to determine if the offender is a sexually violent predator. Such an assessment shall include, but not be limited to, such factors as:

(1) Age of the offender.

(2) Offender's prior criminal record, sexual offenses as well as other offenses.

(3) Age of the victim.

(4) Whether the offense involved multiple victims.

(5) Use of illegal drugs by the offender.

(6) Whether the offender completed any prior sentence and whether the offender participated in available programs for sexual offenders.

(7) Any mental illness or mental disability of the offender.

(8) The nature of the sexual contact with the victim and whether the sexual contact was part of a demonstrated pattern of abuse.

(9) Whether the offense included a display of unusual cruelty by the offender during the commission of the crime.

(10) Any behavioral characteristics that contribute to the offender's conduct.

All State, county and local agencies shall cooperate in providing the necessary information as requested by the board in connection with the required assessment.

(d) Submission of report by board.—The board shall submit a written report containing its assessment to the court no later than 60 days from the date of conviction of the defendant. Where the board members disagree on the assessment of the offender, both members shall submit a written report to the court.

(e) Court review of findings.—Upon receipt of the board's report, the court shall determine if the offender is a sexually violent predator. This determination shall be made based on evidence presented at a hearing held prior to sentencing and before the trial judge. The offender and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses. In

addition, the offender shall have the right to counsel and to have a lawyer appointed to represent him if he cannot afford one. After a review of all evidence presented at this hearing, the court may determine whether the presumption arising under subsection (b) has been rebutted and shall set forth this determination on the sentencing order. A copy of the sentencing order containing the determination shall be submitted to the Pennsylvania Board of Probation and Parole and the Department of Corrections.

(f) Subsequent board review.—No sooner than one year prior to release from a State or county correctional institution, or in five-year intervals thereafter, an offender designated as a sexually violent predator may petition the court with original jurisdiction in the matter for reconsideration of the determination. The court may review the determination and request a new report by the board. The court may enter an order terminating the designation in which case the court shall notify the Pennsylvania State Police.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in subsec. (a), added the last sentence: in subsec. (c), inserted "Upon receipt from the court of an order for an assessment, two members of the board as designated by the administrative officer of" at the beginning of the introductory paragraph, and added the undersignated final paragraph; in subsec. (d), extended the time period from 30 to 60 days, and added the last sentence; and, in subsec. (e), required the court to set forth on the sentencing order its determination whether the presumption arising under subsec. (b) has been rebutted, and added the last sentence.

§ 9795. Registration of offenders

(a) Registration of sexually violent predators.—A sexually violent predator shall be required to register all current addresses with the Pennsylvania State Police upon release

from incarceration, upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation. The offender shall inform the Pennsylvania State Police within ten days if the offender changes residence. The offender shall register with a new law enforcement agency no later than ten days after establishing residence in another state. The registration shall continue unless the court determines the person is no longer a sexually violent predator as provided in section 9794(f) (relating to designation of sexually violent predators). Where the offender has been granted parole by the Pennsylvania Board of Probation and Parole, the board shall collect registration information from the offender and forward that registration information to the Pennsylvania State Police. The Department of Corrections shall not release the offender until it receives verification from the Pennsylvania State Police that it has received the registration information. Where the offender is scheduled to be released from a State correctional facility due to the expiration of the maximum term of incarceration, the Department of Corrections shall collect the information from the offender no later than ten days prior to the maximum expiration date. The Department of Corrections shall forward the registration information to the Pennsylvania State Police. Where the offender scheduled to be released due to the maximum expiration date refuses to provide the registration information, the Department of Corrections shall notify the Pennsylvania State Police of the failure to provide registration information and of the expected date, time and location of the release of the offender. The chief county probation and parole official in cooperation with a county correctional facility shall, in accordance with established guidelines, obtain the required information contained in section 9799.2(2) (relating to duties of Pennsylvania Board of Probation and Parole) regarding offenders released from a county sentence and to submit the information to the Pennsylvania Board of Probation and Parole and the Pennsylvania State Police. The offender in a county correctional facility shall not be released from incar-

ceration or released to a sentence of probation or intermediate punishment until the information has been obtained and submitted as required.

(b) Court information for all offenders.—The sentencing court shall inform offenders designated in section 9793 (relating to registration of certain offenders for ten years) and sexually violent predators designated in subsection (a) at the time of sentencing of the provisions of this subchapter. The court shall:

(1) Specifically inform the offender of the duty to register and obtain the information required for each registration.

(2) Specifically inform the offender of the duty to inform the Pennsylvania State Police within ten days if the offender changes residence.

(3) Specifically inform the offender of the duty to register with a new law enforcement agency if the offender moves to another state no later than ten days after establishing residence in another state.

(4) Order the fingerprints and photograph of the person to be provided to the Pennsylvania State Police upon sentencing.

(5) Require the offender to read and sign a form stating that the duty to register under this subchapter has been explained. Where the offender is incapable of reading, the court shall certify the duty to register was explained to the offender and the offender indicated an understanding of the duty.

(c) Offenders from other states.—As a condition of obtaining residency in Pennsylvania under the interstate compact for the supervision of parolees and probationers, sexual offenders from other states shall be required to register and abide by the requirements of this subchapter and, where the Pennsylvania Board of Probation and Parole determines it is necessary to protect the public, shall submit to public notification as provided in section 9798 (relating to other notification).

(d) Penalty.—Any offender who fails to register with the Pennsylvania State Police as required in this section commits a felony of the third degree.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment rewrote subsecs. (a) and (c), which previously read:

"(a) Registration of sexually violent predators.—A sexually violent predator shall be required to register all current addresses with the Pennsylvania State Police upon release from incarceration, upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation. The registration shall continue unless the court determines the person is no longer a sexually violent predator as provided in section 9794(l) (relating to designation of sexually violent predators)."

"(c) Notice by correctional facility and paroling authorities.—When the offender is to be released from incarceration or paroled from a State or county correctional facility, the prison official of the State or county correctional facility shall no later than ten days prior to the release or parole of the offender again provide the offender with notice of the duty to register with the Pennsylvania State Police under this subchapter."

§ 9796. Verification of residence

(a) Quarterly verification.—The Pennsylvania State Police shall verify the residence of sexually violent predators every 90 days through the use of a nonforwardable verification form to the last reported address. The form shall be returned by the offender within ten days.

(b) Annual verification.—The Pennsylvania State Police shall verify the residence of offenders designated in section 9793 (relating to registration of certain offenders for ten

years) annually through the use of a residence verification form. The form shall be returned by the offender within ten days.

(c) Notification of law enforcement agencies of change in address.—A change of address of an offender required to register under this subchapter reported to the Pennsylvania State Police shall be immediately reported by the Pennsylvania State Police to the appropriate law enforcement agency having jurisdiction of the offender's new place of residence. The Pennsylvania State Police shall, if the offender changes residence to another state, notify the law enforcement agency with which the offender must register in the new state.

(d) Failure to provide verification.—Where any offender fails to provide verification of residence within the ten-day period as set forth in this section, the Pennsylvania State Police shall immediately notify the municipal police department of the offender's last verified residence. The local municipal police shall locate the offender and arrest him for violating this section. The Pennsylvania State Police shall assume responsibility for locating the offender and arresting him in jurisdictions where no municipal police jurisdiction exists. The Pennsylvania State Police shall assist any municipal police department requesting assistance with locating and arresting an offender who fails to verify his residence.

(e) Penalty.—Any offender who fails to verify his residence as required in this section commits a felony of the third degree.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days.

§ 9797. Victim notification

(a) Duty to inform victim.—

(1) Where the offender is determined to be a sexually violent predator by a court under section 9794(e) (relating to designation of sexually violent predators), the local municipal police department or the Pennsylvania State Police where no municipal police jurisdiction exists shall give written notice to the offender's victim when the offender registers initially and when he notifies the Penn-

sylvania State Police of a change of address. This notice shall be given within 72 hours after the offender registers or notifies the Pennsylvania State Police of a change of address. The notice shall contain the offender's name and the address or addresses where he resides.

(2) A victim may terminate the duty to inform set forth in paragraph (1) by providing the local municipal police department or the Pennsylvania State Police where no local municipal police department exists with a written statement releasing that agency from the duty to comply with this section as it pertains to that victim.

(b) Where an offender is not designated as a sexually violent predator.—Where the offender is not determined to be a sexually violent predator by a court under section 9794(e), the offender's victim shall be notified in accordance with section 479.3 of the act of April 9, 1929 (P.L. 177, No. 175), known as The Administrative Code of 1929.[1]

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days.

§ 9798. Other notification

(a) By municipality's chief law enforcement officer.—Notwithstanding any of the provisions of 18 Pa.C.S. Ch. 91 (relating to criminal history record information), the chief law enforcement officer of the police department of the municipality where a sexually violent predator lives shall be responsible for providing written notice as required under this section.

(1) The notice shall contain:

(i) The name of the convicted sexually violent predator.

(ii) The address or addresses at which he resides.

(iii) The offense for which he was convicted.

(iv) A statement that he has been designated by court order as a sexually violent predator, which designation has or has not been terminated as of a date certain.

1. 71 P.S. § 180-9.3.

(v) A photograph of the sexually violent predator, if available.

(2) The notice shall not include any information that might reveal the victim's name, identity and residence.

(b) To whom written notice is provided.—The chief law enforcement officer shall provide written notice, under subsection (a), to the following persons:

(1) Neighbors of the sexually violent predator.

(2) The director of the county children and youth service agency of the county where the sexually violent predator resides.

(3) The superintendent of each school district and the equivalent official for private and parochial schools enrolling students up through grade 12 in the municipality.

(4) The director of each licensed day care center and licensed preschool program in the municipality.

(5) The president of each college, university and community college located within 1,000 feet of a sexually violent predator's address.

(c) Urgency of notification.—The municipal police department's chief law enforcement officer shall provide notice within the following time frames:

(1) To neighbors, notice shall be provided within 72 hours after information of the sexually violent predator's release date and address has been received by the chief law enforcement officer. Notwithstanding the provisions of subsections (a) and (b), verbal notification may be used if written notification would delay meeting this time requirement.

(2) To the persons specified in subsection (b)(2), (3), (4) and (5), notice shall be provided within seven days after the chief law enforcement officer receives information regarding the sexually violent predator's release date and address.

(d) Public notice.—All information provided in accordance with subsection (a) shall be available, upon request, to the general public.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in subsec. (a), required the chief law enforcement officer to provide notice regardless of the provisions of 18 Pa.C.S. Ch. 91 (relating to criminal history record information), and added par.(1)(v).

Law Review and Journal Commentaries

Surprise! You just moved next to a sexual predator. The duty of residential sellers and real estate brokers to disclose the presence of sexual predators to prospective purchasers. 102 Dick.L.Rev. 169 (1997).

§ 9799. Immunity for good faith conduct

The following entities shall be immune from liability for good faith conduct under this section:

(1) The Pennsylvania State Police and local law enforcement agencies and employees of law enforcement agencies.

(2) District attorneys and their agents and employees.

(3) Superintendents, administrators, teachers, employees and volunteers engaged in the supervision of children of any public, private or parochial school.

(4) Directors and employees of county children and youth agencies.

(5) Presidents or similar officers of universities and colleges, including community colleges.

(6) The Pennsylvania Board of Probation and Parole and its agents and employees.

(7) Directors of licensed day care centers and directors of licensed preschool programs.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in par. (3), added employees and volunteers engaged in the supervision of children of any public, private or parochial school to the list of immune entities.

§ 9799.1. Duties of Pennsylvania State Police

The Pennsylvania State Police shall:

(1) Create and maintain a State registry of offenders pursuant to section 9793 (relating to registration of certain offenders for ten years).

(2) In consultation with the Office of Attorney General and the Pennsylvania Board of Probation and Parole, promulgate guidelines necessary for the general administration of this subchapter.

(3) Write regulations regarding neighbor notification of the current address of sexually violent predators.

(4) Notify, within 72 hours of receiving the offender's registration, the chief law enforcement officer of the police department having primary jurisdiction of the municipality in which an offender resides of the fact that the offender has been registered with the Pennsylvania State Police pursuant to sections 9795 (relating to registration of offenders) and 9796 (relating to verification of residence).

(5) In consultation with the Department of Education and the Pennsylvania Board of Probation and Parole, promulgate guidelines directing licensed day-care centers, licensed preschool programs, schools, universities and colleges, including community colleges, on the proper use and administration of information received under section 9798 (relating to other notification).

(6) Immediately transfer the information received from the Pennsylvania Board of Probation and Parole under section 9799.2(2) and (3) (relating to duties of Pennsylvania Board of Probation and Parole) and the fingerprints of the sexually violent predator to the Federal Bureau of Investigation.

All guidelines and regulations promulgated under this section shall be published in the Pennsylvania Bulletin no later than January 1, 1996.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective. Amended 1996, May 22, P.L. 300, No. 46 § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in par. (5), substituted "section 9798 (relating to other notification)" for "section 9797 (relating to victim notification)".

§ 9799.2 Duties of Pennsylvania Board of Probation and Parole

The Pennsylvania Board of Probation and Parole shall:

(1) Create a notification form which will inform State and county prison and probation and parole personnel how to inform offenders required to register under this subchapter of their duty under the law.

(2) In cooperation with the Department of Corrections and other Commonwealth agencies, obtain the following information regarding offenders:

(i) Name, including any aliases.

(ii) Identifying factors.

(iii) Anticipated future residence.

(iv) Offense history.

(v) Documentation of any treatment received for the mental abnormality or personality disorder.

(vi) Photograph of the offender.

(3) Immediately transmit the information in paragraph (2) to the Pennsylvania State Police for immediate entry into the State registry of sexual offenders and the criminal history record of the offender as provided in 18 Pa.C.S. Ch. 91 (relating to criminal history record information).

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective. Amended 1996, May 22, P.L. 300, No. 46, § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment, in par. (2), in the introductory paragraph, required the Board of Probation and Parole to obtain the information in cooperation with the Department of Corrections and other Commonwealth agencies, and added cl. (vi).

§ 9799.3 Board

(a) Composition.—The State Board to Assess Sexually Violent Predators shall be composed of psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders.

(b) Appointment.—The Governor shall appoint the board members.

(c) Term of office.—Members of the board shall serve four-year terms.

(d) Compensation.—The members of the board shall be compensated at a rate of $200 per assessment and receive reimbursement for their actual and necessary expenses while performing the business of the board. The chairman shall receive $500 additional compensation per annum.

(e) Staff.—Support staff for the board shall be provided by the Pennsylvania Board of Probation and Parole.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, imd. effective. Amended 1996, May 22, P.L. 300, No. 46 § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment rewrote subsecs. (a) and (b); and, in subsec. (d), increased the rate of compensation from "$125 per day" to "$200 per assessment". Prior to amendment subsecs. (a) and (b) read:

"(a) Composition.—The State Board to Assess Sexually Violent Predators shall be composed of three persons, one psychiatrist, one psychologist and one criminal justice expert,

each of whom has a minimum of ten years of experience and specialized training in the behavior and treatment of sex offenders.

"(b) Appointment.—The Governor shall appoint the psychiatrist and psychologist board members. The Attorney General shall appoint the criminal justice expert. All appointments shall be made within 30 days of the effective date of this section."

§ 9799.4. Sexually violent predators

(a) Increased mandatory maximum sentence.—Upon the court's finding that the offender is a sexually violent predator, the offender's maximum term of confinement for any offense or conviction specified in section 9793(b) (relating to registration of certain offenders for ten years) shall be increased to the offender's lifetime notwithstanding lesser statutory maximum penalties for these offenses.

(b) Counseling.—The sexually violent predator shall be required to attend at least monthly counseling sessions in a program approved by the board and be financially responsible for all fees assessed from such counseling sessions. If the sexually violent predator can prove to the satisfaction of the court that the person cannot afford to pay for the counseling sessions, that person shall still attend the counseling sessions and the parole office shall pay the requisite fees.

(c) Mandatory sentence.—Notwithstanding any other provision of law to the contrary, when a person who has been designated as a sexually violent predator is convicted of a subsequent sexually violent offense, the mandatory sentence shall be life imprisonment. Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the offender shall have the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

(d) Authority of court in sentencing.—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in

subsection (c), to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

(e) Appeal by Commonwealth.—If a sentencing court refuses to apply this section when it is applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for the imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days. Amended 1996, May 22, P.L. 300, No. 46 § 2, imd. effective.

Historical and Statutory Notes

The 1996 amendment rewrote subsec. (a); added a new subsec. (b); and redesignated former subsecs. (b) to (d) as subsecs. (c) to (e).

§ 9799.5. Exemption from notification

Nothing in this subchapter shall be construed as imposing a duty upon a person licensed under the act of February 19, 1980 (P.L. 15, No. 9), known as the Real Estate Licensing and Registration Act, or an employee thereof to disclose any information regarding an offender required to register under this act.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days.

§ 9799.6. Applicability

The provisions of section 9793(d) (relating to registration of certain offenders for ten years) shall apply to all offenders convicted of an offense equivalent to an offense set forth in

section 9793(b) before the effective date of this section who remain incarcerated or on parole on the effective date of this section. In addition, the provisions of section 9793(d) shall apply to all offenders convicted of an offense equivalent to an offense set forth in section 9793(b) on or after the effective date of this section.

1995, Oct. 24, P.L. 1079, No. 24 (Spec. Sess. No. 1), § 1, effective in 180 days, added 1996, May 22, P.L. 300, No. 46, § 3, imd. effective.